

Below is an Opinion of the Court.

  
ELIZABETH PERRIS  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
JAMES ADOLFO MOGLIA, ) No. 11-35022-elp13  
Debtor. ) MEMORANDUM OPINION

This matter came before the court on creditor Tim Mouraveiko's Motion to Modify Plan ("Motion") (ECF No. 329), which requests four modifications to debtor James Moglia's confirmed chapter 13<sup>1</sup> plan. Mouraveiko seeks to: (1) extend the time for debtor to make plan payments from 36 to 60 months; (2) require debtor to make retroactive payments of additional disposable income into the plan; (3) increase the "best interest of creditors" liquidation figure in the plan because debtor allegedly failed at confirmation to disclose his interest in two vacant lots; and (4) assuming that modification (1) is granted, require debtor

<sup>1</sup> Unless otherwise indicated, all statutory references are to Title 11 of the United States Code.

1 to make increased disposable income payments over the extended life of  
2 the plan. Debtor and the chapter 13 trustee subsequently filed  
3 Objections to the Motion (ECF No. 334; ECF No. 335). The court held a  
4 hearing on August 29, 2014, at which it requested supplemental briefing  
5 on two legal issues raised by the Motion:

6           (1) Whether, under a confirmed plan, debtor must pay amounts  
7 necessary to satisfy both the "best interest of creditors" test in  
8 § 1325(a)(4) and the "best efforts" test in § 1325(b)(1)(B), or whether  
9 instead debtor must satisfy whichever requirement yields the higher  
10 amount; and

11       (2) Whether the applicable commitment period for the chapter 13 plan  
12 payments must be extended from 3 years to 5 years when a debtor whose  
13 income is below median at the time of case filing has a subsequent  
14 increase in income to above the median.

15 After considering the briefing and the arguments at hearing, and for  
16 the reasons set forth below, I will deny the Motion.

## LEGAL ANALYSIS

## A. General Background for Chapter 13 Confirmation

Section 1325 provides the requirements for plan confirmation. As relevant in this case, § 1325(a)(4), commonly known as the "best interest of creditors" test, mandates that unsecured creditors in a chapter 13 case receive at least as much through the plan as they would in a hypothetical chapter 7. If an unsecured creditor or the trustee objects to confirmation, unsecured creditors must receive through a chapter 13 plan either 100% of their allowed claims, see § 1325(b)(1)(A), or "all of the debtor's projected disposable income to be received in the applicable

1 commitment period.”<sup>2</sup> § 1325(b)(1)(B). The “applicable commitment  
2 period” is determined by a debtor’s “current monthly income.”  
3 § 1325(b)(4). Section 101(10A) defines “current monthly income” as the  
4 average monthly income from all sources (subject to enumerated  
5 exclusions) that the debtor receives during the six-month period before  
6 filing for bankruptcy. The debtor’s current monthly income is then  
7 annualized and compared to the median income for a household of equal  
8 size in the same state. § 1325(b)(4). If a debtor’s annualized income  
9 is less than the median, then his or her applicable commitment period is  
10 36 months. § 1325(b)(4)(A)(i). If it is equal to or greater than the  
11 median, then the applicable commitment period is 60 months.  
12 § 1325(b)(4)(A)(ii). The court can make adjustments to the amount of  
13 projected disposable income that must be paid to unsecured creditors  
14 during the applicable commitment period if changes to the debtor’s income  
15 or expenses are “known or virtually certain at the time of confirmation.”  
16 Hamilton v. Lanning, 130 S. Ct. 2464, 2478 (2010).

17       B. Requirements and Standard for Plan Modification

18       Section 1329(a) states that a plan “may” be modified after  
19 confirmation to increase a debtor’s payments or to extend the time for  
20 such payments. The length of a modified plan is subject to § 1329(c),  
21 which states (as relevant in this case) that a modified plan may not  
22 provide for payments over a period that expires after the applicable  
23 commitment period under § 1325(b)(1)(B), unless the court, for cause,  
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25       <sup>2</sup> This latter test is commonly known as the “best efforts”  
26 test or the “disposable income” test. This opinion will refer to  
the test as the “best efforts” test.

1 approves a longer period. Section 1329(b)(1) lists the bankruptcy code  
2 sections that apply to any modified plan proposed under § 1329(a).  
3 Absent from the list is § 1325(b). Courts in this circuit have  
4 interpreted this absence as meaning that the "best efforts" test in  
5 § 1325(b)(B) does not need to be satisfied with respect to modified  
6 plans. In re Sunahara, 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005).

7 Modification is discretionary, In re Mattson, 468 B.R. 361, 366  
8 (B.A.P. 9th Cir. 2012), and predicated on the court's good judgment in  
9 reviewing the motion to modify and the attendant circumstances. In re  
10 Powers, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

11 C. Extension of the Plan's Applicable Commitment Period

12 Mouraveiko first seeks to modify the plan to extend the plan's  
13 applicable commitment period from 36 to 60 months. I hold that there is  
14 not "cause" under § 1329(c) to extend debtor's plan payments from 36 to  
15 60 months.

16 As an initial matter, I reject Mouraveiko's argument that debtor was  
17 actually an above-median debtor at the time of confirmation, so the  
18 appropriate applicable commitment period should be 60 months. Debtor  
19 timely filed his form B22C (Statement of Current Monthly Income) (ECF No.  
20 13), which shows that debtor's income was below the median during the  
21 applicable six-month lookback period and that the applicable commitment  
22 period is 36 months. If Mouraveiko disputed the determination that  
23 debtor's income was below the median and thought that the applicable  
24 commitment period should have been 60 months, then the proper time to  
25 raise that objection was at confirmation.

1 Mouraveiko relies on In re Flores, 735 F.3d 855 (9th Cir. 2013), for  
2 the proposition that the applicable commitment period should be 60  
3 months. The Flores holding applies to a debtor who, according to the  
4 form B22C filed at case initiation, has above-median income. As  
5 explained above, debtor did not have above-median income at the time of  
6 case initiation.

7 Relatedly, Mouraveiko argues that the applicable commitment period  
8 could be shortened to 36 months only because unsecured creditors were to  
9 receive 100% of their claims, and now that he is receiving less than 100%  
10 of his claims, a 36-month duration is inappropriate. This is not so; the  
11 36-month applicable commitment period was a result of debtor being below  
12 the median income, not because the plan would pay all unsecured creditors  
13 in full.<sup>3</sup>

14 The applicable commitment period is not a moving target. Sunahara  
15 holds that § 1325(b), which includes the applicable commitment period  
16 calculation in § 1325(b) (4), does not apply to a modified plan. If  
17 § 1325(b) (4) does not apply to a modified plan, then the applicable  
18 commitment period cannot change merely because debtor's income increased  
19 from below median to above median during the applicable commitment

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21       <sup>3</sup> Mouraveiko's confusion arises from the fact that debtor's  
22 plan (ECF No. 14) states in paragraph 2(f) (1) that "creditors  
23 will receive approximately 100% of their claims." The term  
24 "approximately 100%" is not a guarantee that creditors will  
25 actually receive 100% of their claims. If debtor had wanted to  
assure a 100% distribution to creditors, he would have selected  
paragraph 2(f) (2), not paragraph 2(f)(1). The "approximately  
100%" language is not, as Mouraveiko argues, to satisfy the  
§ 1325(b) (1) (A) requirement that objecting unsecured creditors  
must receive 100% of their claims.

1 period. A leading bankruptcy treatise confirms this:

2 Because current monthly income does not change during the case -- it  
3 remains, by definition in section 101, the average income for the  
4 six months before the petition -- the debtor cannot be forced to  
change the commitment period if the debtor's income later changes  
from below median income to above median income.

5 8 Collier On Bankruptcy ¶ 1325.11[4][d] (Alan N. Resnick & Henry J.  
6 Sommer eds., 16th ed. 2013).

7 I acknowledge that § 1329(a)(2) allows the plan to be modified to  
8 extend the time for plan payments, and § 1329(c) allows the court, for  
9 cause, to approve a longer period than the 36-month applicable commitment  
10 period to make those payments. But I interpret these provisions as  
11 allowing more time to make payments on a 36-month plan (such as if a  
12 debtor needs additional time to cure mortgage arrearages or finish paying  
13 off a car), not allowing a change of the applicable commitment period  
14 from 36 to 60 months at the instigation of a creditor seeking to increase  
15 his recovery. None of the extensive case law to which Mouraveiko cites  
16 offers an example of the applicable commitment period being extended on a  
17 creditor's motion, and despite protracted research, this court could find  
18 no such example. The only case that I located in which an unsecured  
19 creditor successfully modified a plan to increase the payment period, In  
20 re Arnold, 869 F.2d 240 (4th Cir. 1989), is of limited relevance because  
21 it predates BAPCPA,<sup>4</sup> and the "applicable commitment period" is a concept  
22 that arose under BAPCPA.

23  
24 \_\_\_\_\_  
25 <sup>4</sup> Congress passed the Bankruptcy Abuse Prevention and Consumer  
26 Protection Act ("BAPCPA"), which substantially amended parts of  
the Bankruptcy Code, including § 1325(b), in 2005.

1 Assuming without deciding that this court has the power to extend  
2 the applicable commitment period at the behest of a creditor seeking to  
3 increase his recovery, I would still deny Mouraveiko's first requested  
4 modification, because he has failed to demonstrate cause under § 1329(c).  
5 Even if Mouraveiko's allegations of debtor's substantially increased  
6 income during the applicable commitment period are correct (and there is  
7 a genuine dispute as to his figures), the projected disposable income  
8 payments over the additional 24-month period, when added to the  
9 disposable income payments already made by debtor through the plan, would  
10 still fall short of the "best interest of creditors" number in this  
11 case.<sup>5</sup>

12 Debtor has already paid \$10,800 of disposable income into the plan  
13 (\$300/month x 36 months). Mouraveiko would have debtor retroactively pay  
14 \$107,408.25<sup>6</sup> in disposable income into the plan. He would also have  
15 debtor pay \$199,344<sup>7</sup> in future disposable income into the plan (\$8,306 in  
16 monthly disposable income x 24-month extension of applicable commitment  
17 period). Even under this best-case scenario for Mouraveiko, unsecured  
18 creditors would receive \$317,552.25 via the "best efforts" test -- less  
19 than what they will currently receive per the "best interest" number of  
20 \$358,463 in debtor's plan (ECF No. 14).

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22       <sup>5</sup> As discussed infra in Part D, the court holds that these  
23 requirements are not cumulative, contrary to Mouraveiko's  
24 argument.

25       <sup>6</sup> See Motion at 3-5 (ECF No. 329).  
26       <sup>7</sup> See id. at 5.

1 These calculations suffice to satisfy me that there is not cause to  
2 extend the applicable commitment period pursuant to § 1329(c).

3       D. Retroactive Payment of Disposable Income

4       Second, Mouraveiko proposes to modify the plan to require debtor to  
5 make retroactive payments of additional disposable income into the plan.  
6 I hold that there is not sufficient cause to require debtor to make these  
7 payments.

8       Mouraveiko argues that the "best interest of creditors" test from  
9 § 1325(a)(4) and the "best efforts" test from § 1325(b)(1)(B) are  
10 cumulative: the disposable income payments captured through the plan are  
11 above and beyond the "best interest" number that debtor is required to  
12 pay. He effectively argues that any disposable income that debtor has  
13 (or should be required) to pay into the plan does not count toward  
14 satisfying the "best interest" number.

15       I disagree. Mouraveiko misunderstands the protection to creditors  
16 that § 1325(b)(1)(B) offers. Chapter 13 allows a debtor to retain non-  
17 exempt equity by effectively buying such equity on the "installment  
18 plan." This allows a debtor to retain property, such as a house or a  
19 car, that the debtor would otherwise have to surrender. Unsecured  
20 creditors are no worse off than they would be in a chapter 7, because the  
21 "best interest of creditors" test requires them to receive at least the  
22 liquidation value of the debtor's hypothetical chapter 7 case. In this  
23 way, the "best interest of creditors" test acts as a floor: it is the  
24 minimum amount that creditors must receive in a chapter 13.

25       The "best efforts" test, by contrast, functions as a ceiling. It

1 insures that plan completion is feasible and that a debtor with  
2 relatively few assets (and thus a comparatively low "best interest of  
3 creditors" number), a high income, and large amounts of unsecured debt  
4 will make meaningful payments to creditors in a chapter 13. If a debtor  
5 can pay more than the "best interest of creditors" number to unsecured  
6 creditors, then § 1325(b)(1)(B) makes certain that the debtor will pay  
7 them more than the "best interest of creditors" number. If Mouraveiko  
8 were correct that the payments required by § 1325(a)(4) and  
9 § 1325(b)(1)(B) are cumulative, then a debtor would never have sufficient  
10 money under the plan to pay for the assets that he or she is trying to  
11 keep. The debtor would have to liquidate non-exempt assets for the  
12 benefit of unsecured creditors in order to satisfy the "best interest"  
13 number, as all of the debtor's disposable income would have to be used to  
14 meet the "best efforts" requirement.

15 The treatises and case law also suggest that the requirements are  
16 not cumulative:

17 The amount paid to unsecured creditors must meet both the best  
18 interest test [in § 1325(a)(4)] and the projected disposable income  
19 ["PDI"] test [in § 1325(b)(1)(B)], but the same payments from income  
20 used to satisfy the PDI test will also satisfy the best interest  
test. For example, if the PDI test requires the debtor to pay \$200  
per month to unsecured creditors over 60 months, a total of \$12,000,  
and payments of \$200 per month are also sufficient to satisfy the  
best interest test, the plan meets the requirements of both tests.  
21

22 W. Homer Drake, Jr. et al., Chapter 13: Practice And Procedure, § 8:1  
23 (Westlaw, updated December 2014).

24 From the perspective of an objecting unsecured creditor, section  
25 1325(a) provides that a plan must be confirmed if unsecured  
26 creditors will receive the present value of the dividend payable in  
a chapter 7 case unless the debtor's projected disposable income

1       over three years would pay a higher dividend. If a debtor's future  
2       disposable income will pay more than the liquidation dividend,  
3       confirmation must be withheld unless the plan provides for the  
4       higher dividend.

5       In re Keller, 329 B.R. 697, 702 (Bankr. E.D. Cal. 2005) (emphasis added).

6       Although the debtor's proposed Plan payments satisfy section  
7       1325(a)(4), the trustee or unsecured creditors may still object to  
8       Plan confirmation on the ground that under section 1325(b)(1), the  
9       debtor has the ability to and must pay a greater dividend to the  
10      unsecured creditors. While section 1325(a)(4) establishes the  
11      minimum amount a Chapter 13 debtor must pay into the Plan, under  
12      section 1325(b)(1) a debtor may be required to pay even more to the  
13      unsecured creditors.

14       In re Miller, 247 B.R. 795, 797 (Bankr. W.D. Mo. 2000) (emphasis added).

15       The disposable income test in § 1325(b) functions independently  
16       of the best-interests-of-creditors test in § 1325(a)(4) -- the plan  
17       must satisfy both tests to accomplish confirmation. Often the  
18       disposable income test requires greater payments to creditors than  
19       the best-interests-of-creditors test standing alone.

20       Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy § 163.1 (4th  
21       ed. Rev. June 14, 2014), [www.Ch13online.com](http://www.Ch13online.com).

22       I note the language in Miller that 1325(b)(1) "may require" a debtor  
23       to pay even more to the unsecured creditors, as well as the language in  
24       the Lundin treatise that the "best efforts" test will "often require"  
25       greater payments to creditors than the "best interest" test standing  
26       alone. Under Mr. Mouraveiko's theory, § 1325(b)(1)(B)'s "best efforts"  
27       test would always require a debtor to pay more than the "best interest"  
28       test standing alone. The "best interest" figure would be the floor, and  
29       the debtor's disposable income payments would then be stacked on top of  
30       this floor. Miller's "may require" and Lundin's "often require" language  
31       would be nonsensical under this interpretation.

1           E. Increase the "Best Interest" Number

2           Mouraveiko also proposes to modify the plan to increase the "best  
3 interest" figure in the plan because debtor allegedly failed at  
4 confirmation to disclose his interest in two vacant lots. Specifically,  
5 Mouraveiko alleges that debtor willfully concealed the existence of these  
6 vacant lots and made inaccurate representations on his bankruptcy  
7 Schedule A. These misrepresentations allegedly allowed a substantial  
8 reduction of the "best interest" figure at the time of debtor's plan  
9 confirmation.

10         Importantly, Mouraveiko does not allege that debtor acquired  
11 postconfirmation assets. Rather, he alleges that debtor concealed his  
12 ownership interest in the assets at the time of confirmation. Mouraveiko  
13 cited to no authority, and I could find none, that suggested that a  
14 debtor's concealment of preconfirmation assets is an appropriate basis  
15 for a § 1329 motion that modifies the best interest number.  
16 The issue is better cast under § 1330: revocation of a confirmation order  
17 if such order was procured by fraud. See In re Valenti, 310 B.R. 138  
18 (B.A.P. 9th Cir. 2004) (analyzing § 1330 in the context of a debtor who  
19 hid preconfirmation income and concealed her preconfirmation beneficial  
20 interest in real property). However, § 1330(a) sets a deadline of 180  
21 days from the date of entry of the confirmation order for a party in  
22 interest to seek revocation. It does not matter if creditors allege that  
23 the debtor concealed any misconduct. Valenti, 310 B.R. at 145. The 180-  
24 day bar applies to prevent revocation of confirmation even if the fraud  
25 is not discovered until the period has passed. Id.

Mouraveiko is well outside of the 180-day period in which the court could grant a motion for revocation of the confirmation order pursuant to § 1330. I will deny the third proposed modification for these reasons.

F. Increase Future Disposable Income Paid Into Plan

Finally, Mouraveiko seeks modification to increase debtor's plan payments for the duration of the proposed extended plan. This modification is denied because I have already denied the modification that would extend the plan from 36 to 60 months.

## CONCLUSION

Debtor's chapter 13 case has an applicable commitment period of 36 months, and it has now dragged on for more than three and a half years. Mouraveiko and debtor have bitterly contested, both in this court and in state court, a multitude of legal issues arising from this case. This ruling will close at least one chapter of the parties' acrimonious story. The Motion to Modify Plan is denied.

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